

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ROBERT ANTHONY HIGH,

Petitioner,

vs.

DWIGHT NEVENS, *et al.*,

Respondents.

2:11-cv-00891-JCM-LRL

ORDER

This habeas matter under 28 U.S.C. § 2254 comes before the court on petitioner's motion (#2) for appointment of counsel and motion (#1) for stay and abeyance as well as for initial review following payment of the filing fee.

On the motion for appointment of counsel, the court finds that the interests of justice warrant the appointment of counsel given the number and complexity of the potential claims and procedural issues; the lengthy sentencing involved, which includes a life sentence with the possibility of parole after twenty years; and the possibility that a significant amount of time may remain in the federal limitation period for the assertion of claims by appointed habeas counsel in an amended petition without relation back concerns.

The motion for a stay and abeyance will be denied without prejudice to petitioner seeking appropriate relief through counsel following review of the matter.

Nothing herein signifies any implied or tacit holding as to any other issue, including but not limited to, any issues as to a conclusive calculation of the running of the federal limitation period, tolling thereof, procedural default, exhaustion and/or whether an evidentiary hearing is warranted.

1 Petitioner further should note the following, given the procedural history in the state
2 courts.

3 Federal habeas counsel is not being appointed to act as a mere scrivener to restate
4 and reassert each and every allegation and claim presented by petitioner *pro se*. The court
5 is not appointing counsel to pursue claims or arguments that, in counsel's independent
6 professional judgment, have no arguable merit in a federal habeas corpus proceeding.

7 Petitioner thus should not assume that the court will automatically appoint replacement
8 counsel in the event that petitioner and federal habeas counsel do not agree on what claims
9 or arguments should be presented. Appointed counsel's task is to pursue claims that
10 counsel, in his or her own independent professional judgment, believes that a court may find
11 meritorious, not to present claims that petitioner, who is not an attorney, believes to be
12 meritorious. Counsel is under absolutely no obligation to "follow petitioner's instructions" as
13 to what claims or arguments to present and how to present them. Accordingly, presenting
14 the court with an alleged conflict between federal habeas counsel and petitioner based upon
15 a disagreement over how to pursue this case will not necessarily lead to an appointment of
16 replacement counsel. Subject to the circumstances presented at the time, the court instead
17 could find that the interests of justice no longer warrant the continued appointment of any
18 counsel, based upon the premise that if petitioner has such an allegedly irreconcilable conflict
19 with one competent attorney, the situation is not likely to be different with another competent
20 attorney. Counsel, again, is not being appointed to pursue claims that petitioner believes to
21 be meritorious but, instead, is being appointed to pursue claims that, in counsel's independent
22 professional judgment, have arguable merit. Competent federal habeas counsel may well not
23 pursue all of the claims, allegations and arguments in the current pleading.

24 Moreover, the court will not entertain *pro se* filings from petitioner when he is
25 represented by appointed counsel. Following the appointment of counsel, petitioner may
26 pursue this matter and communicate with the court only through filings by counsel.

27 IT THEREFORE IS ORDERED that the clerk of court shall file the petition, which
28 currently is found at #3-1.

1 IT FURTHER IS ORDERED that the motion (#2) for appointment of counsel is
2 GRANTED. The counsel appointed shall represent petitioner in all proceedings related to this
3 matter, including any appeals or *certiorari* proceedings, unless allowed to withdraw.

4 IT FURTHER IS ORDERED that the federal public defender shall be provisionally
5 appointed as counsel and shall have thirty (30) days to undertake direct representation of
6 petitioner or to indicate an inability to do so. If the federal public defender is unable to
7 represent petitioner, the court then shall appoint alternate counsel. A deadline for the filing
8 of an amended petition will be set after counsel has entered an appearance. The court
9 anticipates setting the deadline for one hundred twenty (120) days based upon the current
10 record, which does not establish any period of equitable or other tolling. Federal habeas
11 counsel at all times remains responsible for calculating the federal limitation period and
12 proceeding accordingly, regardless of any scheduling order issued by the court.

13 IT FURTHER IS ORDERED that the motion (#1) for a stay is DENIED without
14 prejudice.

15 IT FURTHER IS ORDERED, with the state attorney general already having been
16 provided informal electronic service, that respondents' counsel shall enter a notice of
17 appearance within twenty (20) days of entry of this order, but no further response shall be
18 required from respondents until further order of this court.

19 The clerk accordingly shall send a copy of this order (together with an attachment with
20 #3-1) to the *pro se* petitioner, the state attorney general, the federal public defender, and the
21 CJA coordinator for this division.

22 DATED: June 30, 2011.

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26 JAMES C. MAHAN
27 United States District Judge
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